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Supreme Court, U.S.
FILED
AUG 26 1996
CLERK

No. 96-173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

B. R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY and J. R. SIMPLOT,

Petitioners,

vs.

THOMAS D. BOX and DON D. BOX, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF CLOYCE K. BOX, CKB & ASSOCIATES, INC., CKB PETROLEUM, INC., BOX BROTHERS HOLDING COMPANY and OKC LIMITED PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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August 26, 1996

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the judgment of the district court should be reversed and remanded for a new trial because the jury's answers to the special interrogatories on petitioners' state law breach of contract, breach of fiduciary duty and punitive damages claims were irreconcilably inconsistent.

RULE 29.6 STATEMENT

Respondent CKB & Associates, Inc. is a nonwholly owned subsidiary of respondent Box Brothers Holding Company.

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B.R. GRIFFIN, DAVID H. HAWK, JAMES A. LYLE, HAYDEN McILROY and J.R. SIMPLOT,

Petitioners,

-against-

THOMAS D. BOX and DON D. BOX, INDEPENDENT CO-EXECUTORS OF THE ESTATE OF CLOYCE K. BOX, CKB & ASSOCIATES, INC., CKB PETROLEUM, INC., BOX BROTHERS HOLDING COMPANY and OKC LIMITED PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners seek discretionary review from this Court of an unpublished decision rendered May 2, 1996 by the United States Court of Appeals for the Fifth Circuit that reversed and remanded for a new trial petitioners' state law claims for breaches of fiduciary duty and the OKC Limited Partnership Agreement by the General Partners of OKC Limited

Partnership on the ground that the jury's inconsistent verdicts on those claims conflicted irreconcilably. As petitioners' lengthy and convoluted statement of "facts" itself illustrates, the unanimous decision of the Fifth Circuit panel (Wisdom, Garwood and Jones, C.J.J.) is fact bound and turns on issues of Texas state law. It presents no important question of law appropriate for review by this Court.

A. Factual and Procedural Background

Since its inception, OKC Limited Partnership (the "Partnership") has owned an undivided 25 percent interest in an oil and gas lease covering South Pass Block 89 in the Gulf of Mexico off the coast of Louisiana. Prior to March 1985, the Partnership arranged to transport its oil production from Block 89 to a receiving station in Louisiana through an oil pipeline (the "Pipeline") owned, in part, by Marathon Oil Company ("Marathon") at a tariff of $2.75 per barrel.

In 1984, as a result of concerns regarding future access to the Pipeline, the Partnership made an offer to Marathon to purchase an interest in the Pipeline. After Marathon conditionally accepted that offer, the Partnership determined that it was unable to proceed with the transaction for several reasons, including its lack of expendable cash, inability to absorb the potential environmental liabilities associated with ownership of the Pipeline, contractual restrictions in a bank loan agreement, and its unwillingness to pledge its oil and gas reserves as security for potential liabilities. Rather than foregoing the opportunity to secure guaranteed access to the

Pipeline, however, the General Partners decided that CKB Petroleum, an affiliate of the General Partners, would purchase the Pipeline interest and dedicate its Pipeline capacity to the Partnership's exclusive use at the exact same tariff always charged by Marathon.

The Partnership assigned its rights under the asset purchase agreement with Marathon to CKB Petroleum and, on February 28, 1985, CKB Petroleum purchased the Pipeline interest from Marathon for $4,757,000 (the "Pipeline Transaction"). The following day, CKB Petroleum agreed to make available to the Partnership, for a twenty year period, all of CKB Petroleum's Pipeline capacity at the same $2.75 per barrel tariff the Partnership had always paid Marathon.

Petitioners, owners of units of interest in the Partnership,[1] commenced this action in November 1987 against the General Partners of the Partnership (Cloyce Box and CKB & Associates, Inc.) and two affiliates of the General Partners (CKB Petroleum and Box Brothers Holding Company). In their complaint, petitioners alleged, among other things, that the General Partners breached the OKC Limited Partnership Agreement (the "Partnership Agreement") and their fiduciary duties by causing CKB Petroleum and the Partnership to enter into the Pipeline

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[1] The Partnership dissolved and transferred its assets and liabilities to Box Energy Corporation in April 1992. At the time of trial, petitioners all owned Class B shares in Box Energy Corporation.

Transaction and by misallocating certain general and administrative expenses to the Partnership.

The case was tried in September and October 1992. In its instructions to the jury on the claim under Texas law for breach of the Partnership Agreement, the district court, at petitioners' request, focused the jury's attention on five separate provisions of the contract that petitioners contended were breached by the General Partners, including sections 3.03(a) and 3.05. (Petition ("Pet.") at A48).[2] As the court explained to the jury (*id.*), Section 3.03(a) of the Partnership Agreement prohibited the General Partners from entering into transactions with the Partnership that were not "fair and reasonable" and on terms "no less favorable" than the Partnership could have received a third party. (App. at 1). Furthermore, Section 3.05, as the jury was instructed (Pet. at A48), prohibited the General Partners from breaching their "fiduciary obligations" and engaging in "willful or wanton misconduct." (App. at 3).

The court likewise instructed the jury on petitioners' claims — also under Texas law — for breach of fiduciary duty and punitive damages. With respect to the fiduciary duty claim, the court advised the jury that it must find for the General Partners if they proved that the transactions "were fair and reasonable to the Partnership." (Pet. at A53).

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[2] Citations preceded by "Pet. at A" are to the Appendix to the Petition; citations preceded by "App." are to the appendix to this Brief in Opposition.

As to punitive damages, the jury was told that it could award such relief if it found that defendants engaged in "some extraordinary misconduct" that was "shocking and offensive," but only if "Plaintiffs have proved that Defendants breached a fiduciary duty *and* acted with malice or willfulness or with callous and reckless indifference." (Pet. at A57) (emphasis in original).

Pursuant to Rule 49(a), Fed. R. Civ. P., the jury was provided with a special verdict form containing a separate interrogatory for each of petitioners' claims. In response to Question 1 on the verdict form, the jury found no breach of the Partnership Agreement. (Pet. at A58-59). The jury thus found that the transactions at issue were neither unfair nor unreasonable and that the General Partners did not breach their fiduciary duties. In response to Question 3, however, the jury inexplicably found that the General Partners did breach their fiduciary duties and, therefore, that the transactions were unfair or unreasonable. (Pet. at A60-61). In Question 4 the jury again found a breach of fiduciary duty and declared the General Partners' conduct to be so "shocking and offensive" that it warranted punitive damages. (Pet. at A62).

B. Course of Proceedings

On March 9, 1994 — about sixteen months after the verdict — the District Court entered judgment for petitioners on the breach of fiduciary duty and punitive damages claims, rejecting respondents' objections to the glaring

inconsistencies in the jury's verdict. The District Court amended its judgment on October 6, 1994 in certain respects not relevant to this Petition.

On May 2, 1996, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and ordered a new trial on petitioners' Texas state law claims for breach of the Partnership Agreement, breach of fiduciary duty and punitive damages. (Pet. at A18-19). The Court of Appeals was unable to find any "satisfactory interpretation" of the jury's answers that could reconcile the obvious inconsistencies in the jury's findings on petitioners' claims for breach of the Partnership Agreement and breach of fiduciary duty. The Fifth Circuit also held that, on the record below, the jury's rejection of the state law breach of contract claim simply could not "be squared" with its punitive damages award under Texas law.

SUMMARY OF THE ARGUMENT

The Petition presents no issue worthy of this Court's review. The Fifth Circuit applied the standard established by this Court, and followed in every circuit, when evaluating conflicts in answers to jury interrogatories. The application of that well-established standard by the Court of Appeals turned upon the plain meaning of the Partnership Agreement, the instructions given to the jury, and the court's interpretation of governing Texas law. The Petition, therefore, involves no conflict with the decisions of this Court or the other courts of appeal and, indeed, presents *no*

issue of federal law at all. Thus, petitioners have plainly failed to establish any "compelling reasons" for granting the writ and the Petition should be denied. Sup. Ct. Rule 10.

The Fifth Circuit's decision was, in any event, clearly correct and completely consistent with the decisions of other courts of appeals in cases involving inconsistent verdicts. The jury's factual findings in its answers to the special interrogatories are in direct conflict and, as the Fifth Circuit held, cannot be reconciled under any circumstances.

ARGUMENT

I.
THE PETITION PRESENTS NO COMPELLING QUESTION OR CONFLICT AMONG THE CIRCUITS FOR THIS COURT'S REVIEW

A. The Fifth Circuit Applied the Correct Legal Standards When Evaluating the Jury's Inconsistent Verdict.

As the Petition concedes (*see* Pet. at 9 n.2), the Fifth Circuit, and every other Circuit, has long recognized the duty of a reviewing court, established by this Court in *Atlantic & Gulf Stevedores* v. *Ellenberg Lines, Ltd.*, 369 U.S. 355, 364 (1962), to resolve, where possible, any inconsistencies in the jury's verdict. Although the Petition suggests that the Court below failed to appreciate this obligation when considering the jury's answers to the special interrogatories (Pet. at 10), the text of the opinion clearly demonstrates that the Fifth Circuit attempted — in vain — to find a basis to reconcile the jury's conflicting answers. The

Court stated:

> The Seventh Amendment requires that courts make a concerted effort to reconcile apparent inconsistencies in a jury's response to special interrogatories. *Mercer* v. *Long Mfg. N.C., Inc.*, 665 F.2d 61, 66 (5th Cir. 1982). When a jury's answers appear to be in conflict, "the reviewing court's duty is to reconcile the conflicts if possible in order to validate the jury's verdict." *FDIC* v. *Munn*, 804 F.2d 860, 866 (5th Cir. 1986). The touchstone inquiry for reconciliation is whether "the answers may be said to represent a logical and probable decision on the relevant issues submitted." *Munn*, 804 F.2d at 866.

(Pet. at A18). "After a careful examination of the record," the Fifth Circuit was unable to find a view of the case that could conceivably reconcile the jury's inconsistent verdict. (Pet. at A19).

The Fifth Circuit, therefore, did not create a rule of law that is at odds with the decisions of this Court or the other circuit courts. Sup. Ct. Rules 10(a) & (c). At most, the Petition claims that the Fifth Circuit misapplied the *correct* rule of law when reaching its decision; such a claim is "rarely" an appropriate ground for exercising this Court's discretionary jurisdiction. Sup. Ct. Rule 10. Furthermore, since, as set forth below, the application of this proper statement of federal law turned upon issues of Texas state law, the Petition clearly presents no occasion for

discretionary review by this Court.

B. The Fifth Circuit's Decision is Fact Bound and Turns Only on Questions of State Law.

Despite petitioners' attempt to manufacture a federal constitutional question out of the Fifth Circuit's decision on their state law breach of contract and breach of fiduciary duty claims, the Petition clearly presents no question of federal law. The unpublished decision of the Fifth Circuit has no significance beyond the unique factual circumstances of this case.

As set forth above, the Fifth Circuit was fully aware of its duty under federal law to harmonize, where possible, the jury's answers to special interrogatories. That court found, however, that the jury's answers were hopelessly irreconcilable because facts essential to sustaining petitioners' breach of fiduciary duty and punitive damages claims under *Texas* law were necessarily rejected by the jury when it found no breach of the express terms of the Partnership Agreement. (Pet. at A19). In seeking review from this Court of that decision by the Fifth Circuit, therefore, petitioners present *no* question of federal law. *See*, *e.g.*, *Denny* v. *Ford Motor Co.*, 42 F.3d 106, 111-12 (2d Cir. 1994) (certifying question to the New York Court of Appeals regarding whether conflicting verdicts on two product liability theories were reconcilable); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 871 F.2d 1368, 1374 (8th Cir. 1988) (inconsistencies between negligence and fraud verdict controlled by state law); *Mercado* v. *Ahem*, 974 F.2d

863, 866 (7th Cir. 1992) (same).

Petitioners' challenge to the Fifth Circuit's interpretation of Texas law and its application to the facts herein thus presents no issue worthy of this Court's review. Sup. Ct. R. 10. The settled "practice [of this Court is] to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion'." *Haring* v. *Prosise*, 462 U.S. 306, 314 n. 8 (1983) (quoting *Bishop* v. *Wood*, 426 U.S. 341, 346 (1976)). For example, in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), this Court declined to review the interpretation given to Kansas law by the Court of Appeals after concluding that the lower court decided correctly that the statute of limitations issue presented on appeal was controlled by state, not federal, law.[3] *Id.* at 534.

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[3] In *Ragan*, as here, the Court of Appeals had reversed the judgment of the district court on an issue of state law. This Court declined to review the court of appeals' decision, believing that it was ill-suited to reevaluate a decision based upon Kansas law and written by a judge who was "a distinguished member of the Kansas bar." *Ragan*, 337 U.S. at 534. Here, Judge Edith Jones, the author of the opinion, was a distinguished member of the Texas bar prior to her appointment to the Court of Appeals and Judge Will Garwood, another member of the Panel, was an Associate Justice of the Texas Supreme Court prior to his appointment to the Court of Appeals. The third member of the Panel, Judge John Wisdom, has been a member of the Fifth Circuit for nearly forty years. *See* 2 Almanac of the Federal Judiciary, Fifth Circuit at 8-20 (1996).

Here, Texas law controls the issue as to whether the jury's conflicting answers to the interrogatories can be reconciled. Consistent with this Court's "practice" of deferring to the courts of appeals when state law is determinative, the Petition presents no occasion for this Court to exercise its discretionary jurisdiction to review the well-reasoned decision of the Fifth Circuit. *See Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ of certiorari as improvidently granted after Court determined that the issues raised were controlled by Pennsylvania law).

The Petition also seeks improperly to have this Court review the voluminous factual record developed in the district court[4] in order to locate some view of the evidence that might be used to reconcile the jury's inconsistent findings. This Court does not, however, "grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925). Regardless of whether "the evidence or inferences drawn from it" could somehow explain the inconsistencies in the verdict, the Petition presents no important question of law and "[g]ranting of the writ would not be warranted." *General Talking Pictures Corp.* v. *Western Elec. Co.*, 304 U.S. 175, 178 (1938).

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[4] The district court's docket contains nearly 1,360 entries. The trial transcript alone comprises more than 4,000 pages and there are over 225 exhibits in evidence.

II.
THE FIFTH CIRCUIT WAS CLEARLY CORRECT IN DECLARING THE JURY'S ANSWERS IRRECONCILABLE

Even if this were an appropriate case for granting a writ of certiorari — and it is not — the Petition nevertheless presents no compelling reason to exercise this Court's jurisdiction because the decision of the Fifth Circuit was plainly correct. Much of the Petition's arguments are based upon the erroneous proposition that the answers to each *claim* presented to the jury must be viewed in isolation. (*See* Pet. at 10, 14). Instead, as this Court has made clear, the Seventh Amendment requires that the jury's answers as a whole be consistent with each other in order to support a judgment on any claim. *See Atlantic & Gulf Stevedores*, 369 U.S. at 364 (comparing jury's answers to plaintiff's negligence claims and defendant's third-party breach of contract claim); *see also Bonin* v. *Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990) ("answers . . . must be read together to arrive at the appropriate judgment"). Because the jury's conflicting interrogatory answers cannot be reconciled under any view of the record developed at trial, the Fifth Circuit was clearly correct in ordering a new trial.

The Petition does not even attempt to refute the undeniable conflict between the jury's finding in Question 1 — that there was *no* breach of Section 3.05 of the Partnership Agreement (prohibiting the General Partners from breaching their fiduciary duties) — and its findings in

both Question 3 and Question 4 that the General Partners had breached their fiduciary duties. Petitioners' only argument in support of the verdict, which is illogical and in any event was never raised below,[5] is that Section 3.05 of the contract "is not a section of the agreement that can actually be breached." (Pet. at 11).

The jury, however, was instructed otherwise. *At petitioners' request*, the district court told the jury that it could find liability if the General Partners breached any provision of the Partnership Agreement, including any "[v]iolation of Section 3.05 prohibiting General Partners from breaching their fiduciary obligations and engaging in willful or wanton misconduct." (Pet. at A48). "[T]he consistency of the jury verdicts must be considered in light of the judge's instructions to the jury." *Bates* v. *Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984) (citing *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 118-22 (1963)). Under the instructions given by the district court, a breach of fiduciary duty by the General Partners was itself a breach of the Partnership Agreement. Thus, the jury found no breach of

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[5] This Court's "normal practice" is to "refrain from addressing issues not raised in the Court of Appeals." *EEOC* v. *Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Since this Court would not "reach or resolve" contentions petitioners failed to raise below if the writ of certiorari were granted, there is even less reason to consider them here. *Id.* (dismissing the writ of certiorari as improvidently granted where based upon issues not raised below); *see Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (arguments not raised below "not properly before" this Court).

fiduciary duty by finding no breach of the Partnership Agreement in response to Question 1. The jury's subsequent determination in response to Question 3 — that the General Partners breached their fiduciary duties — cannot be reconciled under any circumstances.

The Fifth Circuit also concluded correctly that the jury's inconsistent verdict with respect to Section 3.03(a) of the Partnership Agreement required a new trial. By its terms, Section 3.03(a) prohibits the General Partners from transacting any business with the Partnership unless the transaction is "fair and reasonable" and on terms "no less favorable" than could be obtained from third parties. Despite finding that the Pipeline Transaction was fair and reasonable in Question 1, the jury inexplicably found that the same transaction was unfair or unreasonable when responding to Question 3 and, moreover, "shocking and offensive" in its answer to Question 4. (Pet. at A57).

Petitioners' feeble attempts to reconcile the obvious inconsistencies in the jury's finding with respect to Section 3.03(a) of the Partnership Agreement were properly rejected. First, the Petition overlooks the jury's finding on the punitive damages question when attempting to reconcile the jury's answers. The jury was instructed that it could award punitive damages only if petitioners proved that the General Partners "breached a fiduciary duty *and* acted with malice, willfulness or callous and reckless indifference." (Pet. at A57) (emphasis in original). Courts of Appeals have consistently held, as did the Fifth Circuit below (Pet. at

A19), that a jury's finding of malicious or willful conduct is "plainly contradicted" by a jury verdict finding that same conduct to be reasonable. *Finnegan* v. *Fountain*, 915 F.2d 817, 820 (2d Cir. 1990); *see Jefferies* v. *Harleston*, 52 F.3d 9, 13-14 (2d Cir. 1995) (same); *Bates*, 745 F.2d at 1152 (same).

Second, petitioners ignore the plain meaning of the Partnership Agreement and argue that the jury could have found no breach of that agreement simply by concluding that the terms of the transaction were the same or better than that which the Partnership could have obtained from third parties. (Pet. at 11-12). The requirements of Section 3.03, however, are not disjunctive; the Partnership Agreement would be breached by any transaction that was *either* unfair, unreasonable *or* on terms less favorable than could be obtained from third parties. (*See* App. at 2-3). Thus, since the jury had to conclude that the Pipeline Transaction was *neither* unfair nor unreasonable when finding no breach of the Partnership Agreement, the Fifth Circuit committed no error in holding that the same transaction could not constitute a breach of the General Partner's fiduciary duties under Texas law.[6]

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[6] Petitioners also assert disingenuously that the jury could have concluded that the Partnership Agreement did not apply to the Pipeline Transaction because the Partnership "was not a party to the conveyance." (Pet. at 12). Although this argument too was never raised in the Court of

(continued...)

Petitioners' only other argument, based upon the different burdens of proof applicable to petitioners' breach of duty and breach of contract claims (Pet. at 12), was also properly rejected. The burden of proof applicable to each claim has no relevance here. Because the jury was instructed only once as to the proof necessary to establish a breach of fiduciary duty, it necessarily incorporated that standard in its other answers. *Cf. Andrasko* v. *Chamberlain Mfg. Corp.*, 608 F.2d 944, 946-47 (3d Cir. 1979) (different burdens of proof cannot justify finding that defendant gave adequate warning but plaintiff did not assume the risk of injury). The shifting burden of proof imposed upon petitioners and respondents with respect to the claimed breach of fiduciary duty therefore was identical under both Question 1 and Question 3.

In any event, petitioners once again ignore the jury's findings underlying the punitive damages award, which the Fifth Circuit held could not "be squared with" the "jury's rejection of a breach of contract" on the facts of this case.

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[6](...continued)
Appeals (*see* note 5, *supra*), it is, in any event, meritless. As the Petition's recitation of facts makes clear (Pet. at 5), the sequence of events challenged in the complaint by petitioners was the "assign[ment by the General Partners] of OKC's rights under the Asset Purchase Agreement to CKB Petroleum" and the General Partners' efforts to "cause[] OKC to enter into a transportation agreement with CKB Petroleum for 20 years." Under any view of the facts of this case, OKC was a "party" to the transactions at issue and, therefore, Section 3.03 of the Partnership Agreement clearly applied.

(Pet. at A19). Under Texas law, as the district court instructed the jury (Pet. at A57), plaintiff bears the burden of proving each element of a punitive damages claim. *See Transportation Ins. Co.* v. *Moriel*, 879 S.W.2d 10, 18-19 (Tex. 1994). The jury's answers, therefore, cannot be explained by any difference in the burdens of proof because petitioners had the burden of proof in both the punitive damages and the breach of fiduciary duty claims. Thus, the Fifth Circuit found correctly that it was impossible to reconcile the jury's finding in Question 4 that the General Partners committed a shocking and offensive breach of fiduciary duty with its finding in Question 1 that the conduct challenged in the complaint was fair and reasonable and did not breach any fiduciary duties. (Pet. at A19).

* * *

In sum, the Fifth Circuit concluded correctly that the jury's interrogatory answers could not be reconciled. Any other conclusion would ignore the jury's finding that there was no breach of the Partnership Agreement, in violation of *respondents*' Seventh Amendment rights. "[I]n dealing with jury responses that are inconsistent, proper deference to the parties' Seventh Amendment rights to a jury trial precludes entry of a judgment that disregards any material jury finding." *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412, 428 (2d Cir. 1995). Here, the Fifth Circuit's determination that the jury's verdict was irreconcilable in light of the applicable Texas law, the jury instructions given, and the record below was eminently reasonable, and presents no occasion for

discretionary review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 26, 1996

APPENDIX

AMENDED AND RESTATED CERTIFICATE AND ARTICLES OF LIMITED PARTNERSHIP OF OKC LIMITED PARTNERSHIP

[Excerpts]

THIS AGREEMENT made and entered into as of the 12th day of May, 1981, by and among CKB & Associates, Inc., a Texas corporation ("Associates"), and Cloyce K. Box, an individual residing in Dallas, Texas ("Box"), as General Partners, and OKC Corp., a Delaware corporation ("OKC"), as Limited Partner, for the purpose of amending and restating in their entirety the Articles of Limited Partnership of OKC Limited Partnership, a Texas limited partnership, as filed in the Office of the Secretary of State for the States of Texas and Louisiana on May 11, 1981.

* * * *

3.03. *Limitations on General Partners.* Notwithstanding any other provisions of this Agreement, the following prohibitions, restrictions and requirements shall be applicable:

(a) An Affiliate may enter into contracts with the Partnership as operator, seller or purchaser of properties or services, or in other capacities, so long as the transactions are fair and reasonable to the Partnership and the terms of any contract or conveyance are no less favorable to the Partnership than those which could be

obtained from Unrelated Persons.

(b) The Partnership shall not require any Lease or other oil and gas interest or otherwise engage in any exploratory operations outside the Area of Interest, or make any other investment not in furtherance of the purposes of the Partnership.

(c) The Partnership shall not sell all or any part of a Lease to an Affiliate without the prior consent of a Majority in Interest of the Limited Partners.

(d) No Affiliate shall render to the Partnership any oil field equipage, or drilling services or sell or lease to the Partnership any equipment or related supplies unless (i) if such Person is engaged, independently of the Partnership and as an ordinary ongoing business, in the business of providing such services or selling or leasing such items to a substantial extent to other Persons in the oil and gas industry in addition to partnerships in which such Person has an interest, the compensation, price or rental therefor is competitive with rates and prices charged by other Persons in the area engaged in the business of providing comparable services or items that could reasonably be made available to the Partnership or (ii) if such Person is not engaged in such a business, the compensation, price or rental therefor is the Affiliate's cost of such services, equipment or supplies or the competitive rate that could be obtained in the area, whichever is less. The Partnership shall not enter into any turnkey drilling contract with any Affiliate.

(e) Any services for which an Affiliate is to receive compensation from the Partnership shall be precisely described in a written contract which also specifies all compensation to be paid.

(f) The General Partners shall not permit the Partnership to do business in any jurisdiction or political subdivision in which the General Partners and the Partnership have not previously taken such steps as may be necessary to assure for the Limited Partners substantially the same limited liability as is provided for limited partners in limited partnerships formed under the Texas Uniform Limited Partnership Act.

(g) No loans may be made by the Partnership to any Affiliate.

(h) A creditor who makes a Non-Recourse Loan to the Partnership shall not have or acquire, at any time as a result of making the Loan, any direct or indirect interest in the profits, capital or property of the Partnership, other than as a secured creditor.

* * * *

3.05. *Liability of General Partners.* No General Partner, nor any shareholder, director, officer, employee or agent of a General Partner, shall be liable to the Partnership or to the Partners for losses sustained or liabilities incurred as a result of any act or omission which such General Partner in good faith reasonably believed to be in, or not opposed to, the best interests of the Partnership, unless such

act or omission constituted negligence, willful or wanton misconduct or breach of such General Partner's fiduciary obligations to the Limited Partners. A General Partner may rely upon, and shall have no liability to the other Partners or to the Partnership if it relies upon, the opinion of the Partnership's independent public accountants with respect to any matter relating to computations and determinations which affect allocations as provided in Article VI or Distributions as provided in Article VII.

* * * *